HARMONIZATION OF LAWS AND CONVERGENCE BETWEEN COMMON LAW AND CIVIL LAW LEGAL FAMILIES. LESSONS FROM THE OHADA EXPERIENCE*

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I *INTRODUCTION: THE CASE OF OHADA LAW AND ITS IMPACT ON AFRICAN COUNTRIES ADOPTING COMMON LAW LEGAL SYSTEMS*

For a long time, economic operators have been suspicious toward sub-Saharan African countries due to the juridical and judicial insecurity currently prevalent among them. This juridical insecurity stems from the overall antiquity of the laws in force in almost all sub-Saharan countries, the inadequacy of such texts with respect to the needs of the modern economy, and the extreme delay or even the absence of publication of legal rules. The judicial insecurity mainly comes from the decay in justice due to the slowness of the cases, the unpredictability of the courts, the corruption of the judicial system, and the difficulty in enforcing the judgments.

Due to the consequent lack of investments, the need to completely rebuild the judicial system in the area of business law has been felt to entrust again the economic operators towards the African countries[1]. In this view, the idea of the unification of African laws has been considered as the only solution to eliminate obstacles to development amounting from the judicial differences among the varying African nations[2] This will give the countries joining the process of

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1 Kéba MBAYE, *Avant propos du numéro spécial OHADA de la revue Penant*, n. 827 (2000), p. 125 and ff.

2 The issue of diversity of laws has been for a long time an important (even if indirect) obstacle to the African economic development which for a long time has not been taken into proper consideration by the African States. Since the attainment of independence the issue of harmonization of laws in Africa has been addressed: Professor Allott observed that "*the move towards integration or unification of laws has been a consequence of independence, of the desire to build*

regional integration the opportunity to assert their interests in a stronger and more confident position within the international arena.

The Organization for the Harmonization of African Business Laws (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - OHADA)[3] was established by a treaty among African countries, mainly within the French-speaking area[4] and belonging to the Franc zone, signed in Port Louis, Mauritius, on October 7, 1993 and entered into force in July 1995[5]. OHADA's objective is the implementation of a modern harmonized legal framework, in the area of business law, in order to promote investment and develop economic growth. The treaty calls for the elaboration of Uniform Acts to be directly applicable in member states notwithstanding any provision of domestic law.

In particular, uniform law takes concrete form with the adoption of texts called the Uniform Acts. These acts are prepared by the Permanent Secretariat of OHADA in consultation with the governments of the OHADA member States. The Council of Ministers, a body established under the Treaty, discusses and adopts the acts with the advice of the Common Court of Justice and Arbitration (CCJA). It is useful to keep in mind that national parliaments are excluded from the Uniform Acts adoption proceedings. The Council of Ministers has sole competence in this area. This makes it possible to avoid the drawbacks of indirect procedures that could lead to the adoption of conflicting legal texts that would be difficult to implement. The acts become effective immediately after they are published in the Official Gazette of OHADA, without the need for additional domestic legislation from the member States. They are directly applicable and binding in all OHADA countries, notwithstanding any contradictory provisions in existing or future national laws[6]. All the domestic legislations that are not in

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a nation, to guide the different communities with their different laws to a common destiny". See Anthony N. ALLOTT, *Towards the unification of laws in Africa*, in 14 *Int. Comp. Law Quarterly, vol.14*, 366-378 (1965); and Michel ALLIOT, *Problémes de l'unification des droits africains*, in 11 *Journal of African Law* (1967), n. 2, 86-98, where there is a first investigation on the ways to move towards the harmonization of laws in Africa. See also Anthony N. ALLOTT, *The Unity of African Law*, in *Essays in African Law*, (1960) London, Butterworths, 69-71, where the issue is dealt with mainly looking at African customary law.

3 See the OHADA's website at: <www.ohada.com> where the full text of all Uniform Acts, as well as the related case law and a selected bibliography can be found.

4 14 of the 16 present member countries are French-speaking countries.

5 The 16 countries that have joined OHADA include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo. The Democratic Republic of Congo declared its intention to join the OHADA in 2004 and the accession procedure is underway. Angola, Ghana and Nigeria are also currently debating if joining OHADA or not: for a favorable approach on it see Dany Houngbedji RAUCH, *Ghana may opt for Harmonised Business Law*, in African Business, Feb. 2003, Issue 284, p.36; John Ademola YAKUBU, *Harmonising Business Laws in Africa: How Nigeria Can Benefit*, This Day (Nigeria), 9/29/2004.

6 See Seydou BA, *How Can Effective Strategies be Developed for Law and Justice Programs? Are There Models for Legal Reform Programs? The Example of the Organization for the Harmonization of Business Law in Africa (OHADA)*, <www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Ba.pdf>, last viewed 13 October 2005; R.V. Van Puymbroeck, *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century*, (2001) World Bank Publications.

compliance with the OHADA Uniform Acts are repealed by the very enactment of the relevant Uniform Acts[7].

Generally speaking, the current membership hauls from a common tradition. With the exception of Guinea-Bissau and Equatorial Guinea – where Portuguese and Spanish are spoken – and the Anglophone provinces of Cameroon, all the OHADA member countries are Francophone. Moreover, all the OHADA countries have a civil law tradition, with the only exception being the above mentioned English-speaking provinces of Cameroon, where the common law legal system is adopted. All the member countries have signed up to a legal framework where French has officially been declared "the working language"[8].

The legal framework provided through the present Uniform Acts is, in general, based on civil law and has, to a certain extent, borrowed from French business law. However, as there are several substantial differences, it does not amount to a mere transplant of French Law.

The aim of OHADA is to go beyond the original membership and to have other African countries – that are not necessarily Francophone countries or States belonging to the civil law legal tradition - join OHADA. The Treaty indeed opens the doors of accession to all countries that are members of the Organization for the African Unity (now replaced by the African Union) and to other non-member States unanimously invited to join OHADA[9].

The issue of the relationship between OHADA law and the common law is not purely theoretical, but rather, it also has an immediate implication, since some of the English-speaking provinces of Cameroon still apply their common law system within the Cameroonian legal framework.

II COMMON LAW VS. (OR "AND"?) CIVIL LAW

There has been general agreement among the comparatists of civil law and common law to the two systems as two different legal families due to both their geographical extension and historical importance[10]. The classic scholarly debate focused on the specification of the distinctive elements of the two legal families in order to classify the legal systems of the world and determine where a given legal system could fit in. The consequence brought by this legal classification was that any legal system that could not match the criteria of one of the two major

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[7] Article 10 of the OHADA Treaty provides that "*Les Actes uniformes sont directement applicables et obligatoires dans les Etats parties nonobstant toute disposition contraire de droit interne, antérieure ou postérieure*" The text of all OHADA Uniform Acts are available at <www.ohada.com>. On this issue see Joseph ISSA-SAYEGH, *La portée abrogatoire des Actes uniformes de l'OHADA sur le droit interne des Etats-Parties*, in *Revue Burkinabé de Droit*, n° spécial, 39-40, 51.

[8] According to Article 42 of the Treaty, French shall be the working language of OHADA.

[9] See Article 53 of the OHADA Treaty.

[10] See René DAVID, Camille JAUFFRET-SPINOZI, *Les grands systèmes de droits contemporains*, (2002) Paris, Dalloz; Konrad ZWEIGERT & Hein KOTZ, *Introduction to Comparative Law*, (1993) Oxford University Press, 2nd edition; René DAVID, *Le droit comparé. Droits d'hier, droits de demain*, (1982) Paris, Economica; Peter DE CRUZ, *Comparative Law in a Changing World*, (1999) London, Cavendish Publ. Ltd. 2nd edition; A G CHLOROS, *Common Law, Civil Law and Socialist Law : Three Leading Systems of the World*, (1978) *The Cambrian Law Review*, pp. 11-26.

legal systems of the world, (and until the 1980's to the socialist legal family as well) was relegated into a residual category generically called the "other legal systems".

Such debate becomes quite fruitless considering today's reality tells us that the cultural and geographic limits that have been historically used to distinguish between these two legal families are not as important anymore. Presently, the scholarly debate has shifted its attention to study the similarities more than the differences between these two patterns of law, trying to individuate cases where those similarities give rise to phenomena of convergence[11].

Traditionally, the distinction between civil law and common law has been founded on the presence, in the former, of a large amount of abstract and general rules that the courts must apply to the cases brought to their attention being the case law in similar matters - at least theoretically – irrelevant. The latter, however, depends on the principle of *stare decisis* which utilizes the binding force of judicial precedents where the presence of pre-determined legal rules is limited to the essentials. As a consequence of such a distinction, civil law legal systems are characterized by the presence of codes and other statutes containing an extensive number of legal provisions forming the entire *corpus* of laws to be applied by the courts. Such a system is assumed to be self-sufficient; having in it all the rules suited for all possible cases without any need for "external" contributions thus leaving the courts without any space to move beyond the application of the pre-arranged substantive rules. On the other side, the English legal system was conceived as a system with a limited number of statutes and legislative acts and wide autonomy for the courts in determining the rule of law applicable to a specific case and to later serve as precedent for future courts.

This kind of approach started to show its limits at the end of the second part of the last century.

In civil law legal traditions, an increased importance is given to case law both among practitioners and scholars. Courts tend to make their decisions conform to the principles of law contained in the rules set forth in the codes and statutes as well as to how other courts, especially the high courts, have interpreted and applied the codes and statutes. Journals and commentaries related to case law have been established both with regard to case law generally and to specific areas of law specifically. Academic teaching is constantly moving from the simple use of doctrinal handbooks, to a more integrated approach of teaching using case law and incorporating practical classes where the analysis of foreign legal systems is now considered essential to better one's knowledge of a specific legal issue.

In the law-making process area, the trend is to move to the adoption of codes characterized by "open" rules. Thus, leaving the courts to decide between further developments of the single rules (this is the case of the Dutch Civil code

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[11] H. Patrick GLENN, *La civilisation de la Common Law*, in 45 *Revue International de Droit Comparé*, vol. 3, 559 (1993); Ignazio CASTELLUCCI, *Convergence of Civil Law and Common Law Models of Legal System*, in 6 *Boletim da Faculdade de Direito da Universidade de Macau*, vol. 14, 87 (2002); Craig M. LAWSON, *The Family Affinities of Common-Law and Civil-Law Systems*, in 6 *Hastings International & Comparative Law Review*, 85 (1982).*The Family Affinities* cit.

of 1992 where even the traditional hierarchy among the different sources of law has been abandoned); the adoption of rules that are the result of principles elaborated both in the civil law and the common law legal traditions (this is the case of the UNIDROIT principles on the International Commercial Contracts or the CISG who greatly influenced the drafting of the rules on contracts in several countries); or the codification of legal institutions elaborated by the common law tradition (like in the adoption of trust law in China).

On the other hand, common law legal tradition is undoubtedly moving towards a more central role of the written law.

In England, the parliament is continuously involved in law-making activities covering different aspects of legal relations, and in 1998 approved the new Civil Procedure Rules, strongly influenced by the civil law pattern. The legal system of the United States is historically less linked to the classical pattern represented by the English common law: it incorporates the fundamental elements of such a legal tradition but elements belonging to the civil law tradition are evident as well. Specifically, the presence of a written constitution, the civil codes utilized by many states, as well as the Uniform Commercial Code. The latter can be considered very close to a code in a "civil law" sense in that it is used as a reference even when further elaborated upon by a *Restatement*. Indeed, the other *Restatements* elaborated by the doctrine in different areas of law, widely used by courts and lawyers, give the clear picture of the central role played by the doctrinal formant in the elaboration of the law; all these elements are essential to appreciate the degree of difference between the U.S. law and the classical common law features. Other common law jurisdictions are experimenting with increasing level areas covered by written statutes[12].

A more general observation can be made.

Since the Middle Ages common law and civil law legal systems have been developed from a common fund of Western legal concepts. The historical similarities have endowed both of these legal systems with a single ruling set of assumptions regarding the role of law in the social order, the form to be given to law, and its application and substance[13]. Such Western liberal democratic conceptions of law are not only common to civil law and common law legal systems, but also, effectively differ from the concepts of law proper to the socialist, the Islamic, the African, the Indian, the Chinese, and the Japanese legal traditions. Comparative analysis discovered a high degree of convergence between single rules belonging to civil law and common law legal traditions, as well as their fundamental categories, legal concepts, and terminology[14].

Civil and common law seem to converge into a larger and more comprehensive Western liberal democratic family of legal systems, where some common values about law and democracy, as well as, general legal principles in the area of public, administrative, criminal and private laws are shared by the

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12 See Ignazio CASTELLUCCI, *Convergence* cit., at 91.

13 Craig M. LAWSON, *The Family Affinities* cit.

14 The projects related to the feasibility study of a future European civil code, or to investigate on the "common core" of European private law can be taken as an example to this trend.

legal traditions. Although a general sub-distinction between common law and civil law still persists, the major distinctions between them, however, have been greatly diluted in a continuous convergence between the two legal traditions that is currently clearly evident from the harmonization initiatives taken within the European legal community.

III THE PLACE OF AFRICAN LAW

Since African countries are generally classified according to the legal system transplanted (and then inherited) during the colonial age, some short notes should be addressed to determine the place of African law in the ambit of the more general debate regarding the common and civil law traditions.

The current impression is that in Africa the issue cannot be limited to the simple confrontation between common law and civil law. Indeed, any analysis that is limited to the above mentioned dichotomy would be incomplete and not take into proper consideration the reality of African law. The diversity of African law can be examined from three different perspectives: diversity within each country, diversity among the African countries and diversity between African and non-African countries[15].

The legal stratification proper to African countries is clear evidence of the possible differences that may exist within the same country. First, the customary laws which have been applied in African countries prior to colonization and are still applied today present large differences among one another, even within a single country. Second, colonization has brought into the African countries different western legal systems which were imposed upon the customary laws and still have to coexist with them. Third, after gaining independence, the African countries made different choices (some to the socialist pattern, others to the federal system, others importing Islamic legal principles) that increased a lack of uniformity within the same country.

Comparative studies have now identified the African legal systems as a legal structure with specific peculiarities and differences from the legal systems in the rest of the world.[16] The aforementioned legal stratification shows us how the import of western legal systems has given a specific imprint to the legal system of each African State differentiating it from the other African States and giving rise to a sub-classification of an African legal systems rooted in the structure and tradition of the former parent country[17].

Despite that, even if the African legal systems can be assimilated with that of the respective colonizing country, it must not be assumed that the legal rules

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[15] Gbenga BAMODU, *Transnational Law, Unification and Harmonization of International Commercial Law in Africa*, in 38 *Journal of African Law* (1994), n. 2, 125-143.

[16] See Antonio GAMBARO and Rodolfo SACCO, *Sistemi giuridici comparati*, (1996) Turin, UTET; Ugo MATTEI, *Verso una tripartizione non eurocentrica dei sistemi giuridici*, in *Studi in memoria di Gino Gorla*, (1994) Milan, Giuffré, vol. 1, 775-798; and, with particular reference to African law and its characteristics, Rodolfo SACCO, *Il diritto africano*, (1995) Turin, UTET; Marco GUADAGNI, *Il modello pluralista*, (1996) Turin, UTET.

[17] Gbenga BAMODU, *op. ult.cit.*

in African countries are the same as the European country from which they received their legal system. Since the reception of the European laws during the colonial period, there have been several legal developments in the European countries that have not been transplanted into the legal systems of the former colonies. At the same time the African countries engaged in their own legal developments involving the revaluation of customary law, the development of their own case law, and the transplants from other non-European legislations. The key role still played by the customary law, as well as the peculiarities that in Africa assumes the influence of the religious law (Islam) giving when present (often melted with traditional influences) the African legal systems connotations that we do not find anywhere else in the world.

IV OVERCOMING THE DIFFERENCES: A CASE STUDY ON OHADA LAW

The case of OHADA is emblematic in considering the issue of the relationship between civil law and common law legal system while also focusing on the present development of African law.

The main characteristics of the OHADA legal framework have been briefly outlined in the introductory part of this paper.

The current debate reflects the needs of the harmonization process to fully implement the idea of OHADA: on the one hand, to reinforce the membership with other countries belonging to the French area of influence. On the other hand, to open the doors of accession to other African countries belonging to different legal and cultural experiences.[18] Only a few scholars have dealt with the issue of the relations between the OHADA legal system and common law, and it is not surprising that they are almost all from Cameroon, the country where the question is more pressing[19].

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[18] Apart from the next accession of the Democratic Republic of Congo, some efforts are made to increase the knowledge of OHADA both in the Anglophone African countries and in the Portuguese-speaking countries. In Ghana, both conferences and an OHADA resources centre have been set up and under an initiative of the Attorney-General and Minister of Justice at the time, Mr. Nana A.D. Akufo-Addo, in 2002 Ghana's Government established a 5-panel National Committee of legal expert under the aegis of the Ministry of Justice to review the prospect of joining OHADA. The results of the initiative have never been rendered public. In Paris, on March 9, 2006, in the course of an official luncheon, Ms. Ellen Johnson-Sirleaf, President of Liberia, stated that she was strongly supportive of Liberia joining the OHADA common system of business laws. Nigeria has also organized conferences and opened a centre to promote OHADA law in that country. A handbook on OHADA business law in Portuguese is under publication in Angola where discussions about the possibility to join OHADA are ongoing.

[19] See Fidèle TEPPI KOLLOKO, *Droit et pratique de la common law à l'épreuve du droit OHADA*, in *Recueil Penant*, vol. 116, 353 (2006); Akere T. MUNA, *Is OHADA "Common Law Friendly"?*, in 3 *International Law FORUM du droit internaional*, no. 3, p. 172-179 (2001). See also Nelson ENONCHONG, *The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?*, in 51 *Journal of African Law*, n. 1, p. 95-115; and – even if incidentally – Samuel KOFI DATE-BAH, *The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa. Reflections on the OHADA Project from the Perspective of a Common Lawyer from West Africa*, in *Uniform Law Review*, vol. 9, p. 269-273 (2004); and Richard FRIMPONG OPPONG, *Private International Law in Africa: The Past, Present and Future*, in 55 *Am. J. Comp. L.*, 713 (2007).

Those studying the possibility of African countries with a common law legal system joining OHADA have highlighted a number of problems standing in the way.

One problem deals with the principle set forth in Article 10 of the Treaty, according to which *"Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws"*. As it may be easily noted, not only do the new Uniform Acts automatically repeal any piece of contradictory legislation, but also, the State cannot enact laws with regard to the subject matter, being the same reserved to the competence of the OHADA Council of Ministers, and being any eventual municipal law null and void further to the provision of said Article 10. Moreover, the Uniform Acts can only be modified under the conditions provided for at their adoption and the possibility to intervene in such matters at a municipal level is completely removed. In this respect, the Common Court of Justice and Arbitration (CCJA) has clarified that the repealing effect set forth in Article 10 of the OHADA Treaty referrs to the abrogation and prohibition against enacting any internal norm of law or regulation (regardless of whether it is an article of the text, a paragraph or a sentence of it), either present or future, contrasting a rule from the Uniform Act[20].

It has been noticed that this feature of the OHADA legal framework does not clash, at least in principle, with the basic feature of common law where the lawmaker intervenes when there is a need to determine some fixed point of a specific issue. The OHADA legal system should fit well within this framework because it brings in a set of specific rules to a legal area that is extremely critical for African countries and, thus, possible overrules legal precedent that possible investors could, currently, see as potentially harmful[21].

Another potential problem is that of language. It is said that since the current members of OHADA are predominantly French speaking States, it would be difficult for English speaking States to join. The provision of Article 42 of the Treaty, where French is provided as the sole language of OHADA and its Uniform Acts, has been considered a barrier to prevent the adhesion of English-speaking countries. It shall be said that up to now, very little has been done to address such an important issue: no Portuguese and Spanish versions of the Uniform Act have been officially published[22] and the English versions of the same Acts are neither of the best quality nor have any official value[23]. A further

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20 See the opinion n. 001/2001/EP of 30 April 2001 rendered by the Common Court of Justice and Arbitration upon demand of the Ivory Coast and available in Felix ONANA ETOUNDI and Jean Michel MBOCK BIUMLA, *Cinq ans de jurisprudence commentée de la Cour Commune de Justice et d'Arbitrage de l'OHADA (CCJA) (1999-2004)*, (2006) Abidjan.

21 See Fidèle TEPPI KOLLOKO, *Droit et pratique* cit., 348.

22 Unofficial translations are available on the net. See, for example, the website <www.jurisint.org>.

23 It should be noticed that a handbook on OHADA business law in Spanish has been published under the auspices of the Spanish Ministry of Justice: see José M. CUETO, Sergio ESONO ABESO TOMO, Juan Carlos MARTÍNEZ, *La armonización del Derecho Mercantil en África impulsada por la OHADA*, (2006) Madrid, Ministerio de Justicia; while one in Portuguese language is now under publication in Angola.

consequence could be that the lack of authoritative information on the OHADA laws in English and the provisions of Article 42 of the Treaty, could result in discrimination of English-speaking citizens (and this issue could be applied *mutatis mutandis* to Spanish and Portuguese-speaking countries as well) with respect to the right of access to justice, since they would not be able to present their cases in the CCJA because they are not able to manage French[24].

The problem of the language surely represents anyway an issue do be definitively addressed intervening directly on the text of Article 42[25], but the possibility to "work" on the application of the OHADA legal framework as it is should be explored anyway. A tool in this sense could be represented by Articles 7 and 8 of the OHADA Treaty that set forth the procedure to approve the Uniform Acts. Article 7 gives the Member Countries a term of 90 days from the date of reception of the draft versions to submit their written observations to the Permanent Secretary Office. While Article 8 prescribes the unanimity of the representatives of the Member States to approve a Uniform Act. These tools can give any State the opportunity to request insertion in the draft Uniform Act, elements that are deemed necessary with respect to its legal system and to refuse approval if unsatisfied with the proposed text. The articles also allow for the possibility of expressly requiring the adoption of an English text of the new act, (as well as Spanish or Portuguese) together with the French one to address the issue of the language. If we examine Article 42, it speaks about French not as the "official language" but as the "working language" of OHADA. This element should therefore mean that "works" are done in French but texts in other languages are admitted, with none of the languages being an "official" one.

Such an interpretation opens the door to the adoption of Uniform Acts "worked" in French but enacted in more than one language (obviously being aware of the relevant problems in terms of different meaning of legal terminology in different legal systems and the consequent difficulties in translation of legal texts[26]). The experience of Quebec, where legislation is now

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[24] The issue is raised with reference to Cameroon again by Nelson ENONCHONG, *The Harmonization* cit. Here the discussion is widened also to Equatorial Guinea and Guinea-Bissau. The argument proposed by the author that poses the issue at a domestic level (*"A Cameroonian is constitutionally entitled to speak English in a court set up by the state, which includes the OHADA court"*) seems not to be convincing since the CCJA was not set up by Cameroon who rather assigned to the CCJA the competence to judge on final appeal on OHADA business law cases so renouncing to part of its domestic jurisdictional competence in favor of a supranational court, as the other Member States did.

[25] The new text of the new Article 42 of the Treaty has been already drafted, by providing French, English, Portuguesa ns Spanish as OHADA official languages, having all the same value and dignity. Now it needs only the final approval by the Council of Ministers.

[26] See on the issue of legal language and translation Antonio GAMBARO and Rodolfo SACCO, *Sistemi giuridici* cit.; Rodolfo SACCO, *Riflessioni di un giurista sulla lingua (la lingua del diritto uniforme, e il diritto al servizio di una lingua uniforme)*, in *Riv. dir. civ.*, 1996, I, 57; ID., *Language and Law*, in Barbara POZZO (cur.), *Ordinary Language and Legal Language*, (2005) Milan, Giuffrè; Lorenzo FIORITO, *Traduzione e tradizione giuridica: il Legal English dalla Common Law alla Civil Law*, available at <www.translationdirectory.com/article572.htm> last viewed on 15 October 2005; Nicholas KASIRER, *Bijuralism in Law's Empire and in Law's Cosmos*, 52 J. Legal Ed. 29-41 (2002); ID., *François Gény's libre recherche scientifique as a Guide to Legal Translation*, 61 Louisiana L. Rev. 331-352 (2001); Jean-Claude GÉMAR, Nicholas KASIRER (eds.), *Jurilinguistique: entre langues et droits/Jurilinguistique Between Law and Language*, (2005) Brussels/Montreal, Bruylant/Thémis; Alain A. LEVASSEUR, *La guerre de Troie a toujours lieu... en Louisiane*, in *Écrits*

issued in both English and French, can be of significant help to address the problem of language within the OHADA and its Uniform Acts.

But if we move to the role of the CCJA we can argue that there is not such a big difference between OHADA (intended as a legal framework based on the civil law pattern) and the common law pattern. Specifically, with reference to one of the pillars of the common law legal system: the rule of precedent.

In describing the function of the CCJA, Article 14, paragraph 1, of the Treaty says that "[T]he *Common Court of Justice and Arbitration will rule, in the Contracting States, on the interpretation and enforcement of the present Treaty, on such Regulations as laid down for their application, and on the Uniform Acts.*" According to paragraph 2, to realize such a function "[T]he *Court may be consulted by any Contracting State or by the Council of Ministers on all questions falling within the field of the preceding paragraph. The right to request the advice of the Court, as herein before mentioned, is recognised to the national courts* [...]" when hearing a case in first or second instance where the application of OHADA law is concerned. With reference to the authority of the CCJA jurisprudence Article 20 states that "[T]*he judgments of the Common Court of Justice and Arbitration are final and conclusive. [...] In no case may a decision contrary to a judgment of the Common Court of Justice and Arbitration be lawfully executed in a territory of a Contracting State*". The most significant characteristic of the CCJA can be found in the last paragraph of Article 14 according to which "*While sitting as a court of final appeal, the Court can hear and decide points of fact*".

This peculiar role assigned to the CCJA by the OHADA Treaty seems to be closely related to the concept of the rule of precedent, the main characteristic of the common law legal family. To better understand the significance of this notion it is necessary to distinguish between the uniform practice of following precedent and the rule of *stare decisis*. Only the latter is the real peculiarity of the common law legal systems as it stands for the legal obligation for a judge to follow some precedents, being the rule according to which similar cases should be decided similarly a rule of justice recognized in all western legal systems[27]. The doctrine of *stare decisis* is essentially grounded on the distinction between *ratio decidendi* and *obiter dictum*. Not everything which a judge states in his judgment creates a precedent, but only his statement of law in relation to the facts brought to his attention: this statement is the *ratio decidendi* of the case[28]. Judges can also, and they often do, pronounce *obiter dicta* in the ambit of their judgments related to

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en hommage a Gérard Cornu, (1994) Paris, PUF, 278. In any case the work on the language and legal translation is to be considered highly demanding but possible, not agreeing with the stark extreme position of Pierre LEGRAND who considers translation between differently socially embedded legal mentalities as quite impossible (see: Pierre LEGRAND, *Fragments on Law-as-Culture*, (1999) Deventer, Willink) and language as "insurmontable" (see: Pierre LEGRAND, *Word/World (of Primordial Issues for Comparative Legal Studies)*, San Diego Legal Studies Paper No. 07-114). From the same author see also: *Issues in the Translatability of Law*, in Sandra Bermann & Michael Wood (ed.), *Nation, Language, and the Ethics of Translation*, (2005) Princeton University Press; and *The Impossibility of Legal Transplants*, in Maastricht J. Eur. Comp. L., 1997, 111.

[27] Ugo MATTEI, *Common law. Il diritto anglo-americano*, (1992) Turin, UTET; Philip S. JAMES, *Introduction to English Law*, (1979) London, Butterworths.

[28] John WHEELER, *The English Legal System*, (2002) London, Longman; Catherine ELLIOTT and Frances QUINN, *English Legal System*, (2002) London, Longman.

issues of law that are not directly relevant to the case. Those principles are never binding, and other judges have no duty to follow them, although, they can be of guidance for other judges especially when coming from judges with a high reputation[29].

A precedent, then, is a judicial decision that contains a principle with an authoritative element which is often called *ratio decidendi*. The decision is binding between the parties but it is the *ratio decidendi* that is legally binding on latter judges[30].

Moving back to the functions of the CCJA, it is clear that when the Court is called to interpret the Treaty it gives an interpretation of the OHADA rules that will be binding for the judges of the member countries (like the *Court de Cassation* in French or *Corte di Cassazione* in Italy, the *Tribunal Supremo* in Spain or the *Bundesgerichtshofes* in Germany). But what happens when the Court will judge on the facts as the court of last instance in the system? It is well known that courts of last instance in civil law legal systems are not called upon to decide on points of fact. The CCJA will solve the case by applying a rule and it will interpret the rule providing something very similar to what has been identified as *ratio decidendi* in the common law system. Judges of member countries will follow that interpretation and consequent decision when a similar case is presented.

The analysis of the above issues reveals that even in Africa there is competition – and in some cases conflict – between the need of regionalization as an instrument of development in view of globalization and the need for reform within their respective legal models[31]. This is nothing more than the general debate about the assumption that common law is more inclined than other legal patterns to sustain economic growth and wealth and that countries belonging to the civil law system (and in particular the French model) tend to have a weak enforcement of law and are less economically successful than countries who adopted common law[32]. This theory is based on the assumption that civil law legal systems create an environment more *dirigiste* (the Napoleon Code empowers the executive over the judiciary) and less developed and efficient[33] as opposed to the common law jurisdiction which are more oriented towards the free market and the protection of property rights, resulting in inefficiencies[34], and, as a whole, in a lesser development of civil law countries with respect to

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29 Philip S. JAMES, *Introduction* cit., at 19.

30 See John William SALMOND, *Jurisprudence*, (1966) London, Sweet & Maxwell.

31 See Akere T. MUNA, *op. cit.*, at 177.

32 The assertion was originally made by Friedrich A. HAYEK, *The Constitution of Liberty*, (1960) London, Routledge & Kegan Paul; ID. *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy*, (1973) London, Routledge & Kegan Paul; and more recently has been resumed and re-elaborated by Rafael LA PORTA, Florencio LOPEZ-DE-SILANES, Andrei SHLEIFER and Robert W. VISHNY, *Law and Finance*, 106 *J. Pol. Econ.* (1998), 1113, and is the founding issue of the "Law and Finance" theory.

33 Paul G. MAHONEY, *The Common Law and Economic Growth: Hayek Might Be Right*, in 30 *J. Legal Studies* (2001), 503.

34 Thorsten BECK, Asli DEMIRGÜÇ-KUNT and Ross LEVINE, *Law, Endowments and Finance*, in 70 *J. Fin. Econ.* (2003), 38.

common law countries[35]. Such a theory has been strongly criticized by the scholars belonging to the civil law world[36].

The discussion on the present convergence between civil law and common law should bring us to no longer consider the two systems as separate or different. Further, as I tried to demonstrate above, the OHADA legal framework already contains principles that can be handled with the lens of a common law lawyer and should bring us to affirm that the problem of the relation between OHADA and common law is considerably less significant than the way it is currently viewed and presented. Surely the language issue exists, but the need to change Article 42 of the Treaty coming by the same OHADA member States who believe English, Spanish and Portuguese as languages carrying the same value as French and the fact that a proposal to proceed with this change has been elaborated shows that there is a will from these countries to solve the central problem potentially preventing the accession of countries belonging to a different legal system. Moreover, the experience of the European Union shows that it is possible (at least in principle) to bring civil law and common law systems within the framework of a harmonized legal system[37].

V SOME FIRST CONCLUSIONS

What is the outcome of the above discussion?

A first deduction may be that the the conflict between OHADA as an expression of the civil law legal system conflicting with the common law is perhaps non-existent. It is more a political than a juridical issue, a sort of apparent problem, perceived only by the elite of jurists formed on old western approaches which fail to see the African reality. For the African States the important issue is not "common law vs. civil law" but to have an easy, effective and reliable instrument to rule its commercial activities, *latu sensu* intended.

Therefore maybe it is the approach that should change.

The African legal culture followed a development path based on a creation of the legal rule that has been called "customary law", whose peculiarity is to set itself up and to evolve without the intervention of a central power, as a type of spontaneous law. Africa and its culture did not live through the events that

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35 Paul G. MAHONEY, *The Common Law and Economic Growth: Hayek Might Be Right*, in 30 *J. Legal Studies* (2001), 503.

36 The theory affirming the inadequacy of the civil law pattern for producing economic development (recently newly recovered by the World Bank in its *Doing Business 2007* after having been affirmed in the previous ones) has been firmly contested by the countries belonging to the civil law family. The famous French legal association "Henri Capitant" produced in 2006 two volumes titled *Les droits de tradition civiliste en question. À propos des rapports Doing Business de la Banque Mondiale* where scholars belonging to the civil law countries criticized the approach of the World Bank. The first volume includes studies from French scholars, while in the second volume includes studies coming from scholars of other civil law countries.

37 For a comparison between EU and OHADA see Marie Joseph COFFY DE BOISDEFFRE, *Le rapprochement des normes de l'OHADA avec la législation des Pays de l'Afrique anglophone à la lumière de l'expérience de l'harmonisation du droit des affaires des Pays de l'Union Européenne*, in 114 *Recueil Penant*, issue. 849, 425 (2005).

created the legal culture seen in Europe. All studies on African law tell us that customary law has been always resistant to any external attempt to eliminate, change or influence it, being always capable to modify itself according to the changed situations.

If we go back to our case study – OHADA law – it seems quite unlikely that the parties of a case related to a sale of a photocopy machine in the Comoros, to a purchase of fish in Senegal, or to a commerce of wood products in Cameroon will deal with their issue in Abidjan with a lawyer[38] that they do not likely know, since there is no provision in the OHADA system related to the financial help for poorest people to access justice[39]. Moreover, it should be noted that as we have the official law and the unofficial law in Africa, we also have an area of official commerce as well as a wide area of "informal" commerce important at the same level for the State economies. Those two types of commerce co-exist in most African countries.

The opening of OHADA to countries belonging to the common law (or mixed) tradition will surely open the debate to several semantic, conceptual and procedural questions[40] that will give way to scholarly debate on issues that will not interest the African. It should always be remembered that any law is good law only if and when it becomes easily understandable and accessible to the people. Sometimes the African jurists have a sort of "purist" approach, looking at the law through that Western conception they learned in the universities, while law is better viewed as a social phenomenon strictly linked to the environment where it is created and lives[41].

Due to its unique peculiarities African law should go beyond today's "sterile" debate of *common law vs. civil law* and ground its development on its essential characteristics. It is then important to respect the African vision related to law based on practices, and to introduce those Western concepts and peculiarities that are common within the African traditions. To arrive at the creation of an "African" law[42] and to avoid a fracture among the different legal actors whose consequence could bring this new epiphany of African law to be catalogued as a further case of inefficient law. It is necessary to avoid the conflict to avoid rejection.

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[38] According to Article 19 of the Treaty, the assistance of a lawyer before the CCJA is compulsory.

[39] This fact is witnessed by the fact that most of the cases ruled by the CCJA relate to the Ivory Coast.

[40] See Laurent BEN KEMOUN, *Plaidoyer tempéré pour l'OHADA, onze ans après le traité de Port Louis*, in Etienne LE ROY (cur.), *Juridicités. Témoignages réunis à l'occasion du quarantième anniversaire du LAJP*, (2006) Paris, Khartala.

[41] Constantin TÓHON, *Le traité de l'OHADA, l'anthropologue du droit et le monde des affaires en Afrique et en France*, in Etienne LE ROY (cur.), *Juridicités. Témoignages réunis à l'occasion du quarantième anniversaire du LAJP*, (2006) Paris, Khartala.

[42] Moreover Michel ALLIOT, in *Problémes* cit., already pointed on the "*désoccidentalisation des règles juridiques*" and on the adoption by African lawmakers of common legal classifications and concepts as the main instruments necessary to pursue an objective of legal harmonization in Africa

The principle of unanimity set forth in Article 8 of the OHADA Treaty to adopt new Uniform Acts binding for all the member States can be easily seen as a transposition (nobody knows how much it was deliberate or not) of the more general – and purely African – traditional principle of unanimity in making decisions within the group: in Africa long discussions are made within the group to reach a final agreement among its members because in Africa it is legitimate to persuade, not to impose.

How can this goal be reached?

The success of this African juridical revolution inevitably passes through the acknowledgement of the African legal pluralism[43]. It cannot be hidden that African tradition, in its full meaning, is a source of law equal to state law, the jurisprudence, the revelation, and the doctrine[44]; and after a period where they refused to recognize the role of traditional law, African countries are now starting to realize its importance within African law as a whole[45].

Then the possibility of an investigation to research the "common core" of African law should be examined in order to extract from different African traditions the features common to all of them[46].

It is useful to approach this issue with a pluralistic view: the jurist should not approach the study of African traditional law from the legal point of view only, but he should be ready to conduct an interdisciplinary analysis interacting with specialists in other fields (sociologists, anthropologists, linguists, economists, historians) that can give him an idea of the different aspects involved in the creation and application of a legal rule[47].

In the commercial sector this objective can be pursued by finding a way to consider the existence of the "informal" sector of commerce that constitutes a relevant part of the African economy and is presently ignored by the OHADA law. A way to establish a system of settlement of disputes should also be found, which takes into consideration the lower level of scholarization in Africa as well

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43 The idea of African legal pluralism presupposes the concept of legal pluralism itself, defined by Jacques VANDERLINDEN, in *Villes africaines* cit., as the situation where a person is in presence of different autonomous legal orders and with his choice he steers the solution to have a possible conflict both with regard to the competent jurisdiction and the applicable law.

44 Jacques VANDERLINDEN, *op. cit.*

45 For example, Article 4 of the Mozambican Constitution of 16 November 2004, titled "*Legal Pluralism*" says: "*The State recognizes the different systems of law and settlement of disputes that coexist in the Mozambican society, insofar as they do not contravene the fundamental values and principles of the Constitution*". The situation here is different from Egypt or Pakistan where the constitutions set forth a hierarchy among the different legal orders operating within the same legal system that – therefore – remains unique.

46 For the methodology, reference can be made to Mauro BUSSANI and Ugo MATTEI (eds.), *The Common Core of European Private Law,* (2003) The Hague, Kluwer, with the necessary – and obvious – adaptations to African law and reality. Moreover, with regard to the needs and problems of the initiatives aiming at a legal integration in Europe see Mauro BUSSANI, *'Integrative' Comparative Law Enterprises and the Inner Stratification of Legal Systems,* in *European Review of Private Law* (2000), vol. 8, Issue 1 85-99.

47 The work of Anthony N. ALLOTT, in *The Unity* cit., can be seen as an embryonic step towards this research of the "common core" of African law.

as the logistic difficulties in reaching places where justice is administered, even within the same country[48].

[48] Constantin TOHON, *Le traité* cit. The research on the *common core* of African law could explain the way to reach the "integration" he simply wishes.